IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 615.

THE NEWARK NATURAL GAS AND FUEL COMPANY,

Plaintiff in Error.

vs.

THE CITY OF NEWARK, OHIO,

Defendant in Error.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET.

MAY IT PLEASE THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Newark Natural Gas and Fuel Company, plaintiff in error, by its attorneys, before answering the claims made by the motion filed herein, states that in order to avoid useless repetition, the various copies of original papers set out in the brief of defendant in error will not be repeated herein, but references will be made thereto, to-wit:

REFERENCES.

1st. The original petition, pages 17 to 21, inclusive.

2nd. Answer of Newark Company, pages 26 to 28, inclusive.

3rd. Reply, pages 28 to 29.

4th. Petition for writ of error, pages 30 to 31.

5th. Contract between the Logan Natural Gas and Fuel Company, and The Newark Natural Gas Company, pages 45 to 50, inclusive.

6th. Ordinance of 1898, granting franchise to the Newark Natural Gas and Fuel Company, and its acceptance, pages 21 to 24, inclusive.

7th. Ordinance fixing rate, of March 6th, 1911, pages 25 to 26.

8th. Decision of the Court of Common Pleas of Licking County, Ohio, Jewel, J., pages 52 to 59, inclusive.

9th. Decision of Court of Appeals of Licking County, Ohio, Shields, J., pages 60 to 85, inclusive.

10th. Decision of Supreme Court of Ohio, Matthias, J., pages 86 to 95, inclusive.

THE ISSUE.

On the 25th day of April, 1911, the City of Newark, Ohio, brought an action against the Newark Natural Gas and Fuel Company to compel said Company to furnish natural gas for fuel and light to the City of Newark, by virtue of a certain franchise theretofore granted, and in compliance with a certain rate ordinance passed on the 6th day of March, 1911, and that said defendant be compelled to specifically perform said ordinance.

A temporary restraining order was granted.

The defendant answered that said ordinance was unreasonable and should be declared null and void; that it was contrary to and in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States, and, therefore, without due process of law, and denies to the defendant the equal protection of the laws, and is therefore null and void.

The sole question raised was the reasonableness or unreasonableness of the rate fixed, to-wit, 18 cents, net, per thousand cubic feet, for production, transportation and distribution to the consumers of natural gas within said city. This constitutional defense, that it was confiscatory of the property rights of the defendant, was the controlling defense, and so recognized throughout the trial. It was followed and vigorously insisted upon through all the courts; was carried into the petitions in error.

In the opinion of the Court of Common Pleas, found on pages 52 to 59 inclusive, of the brief of defendant in error, the court (Jewel, J.), on page 53 says:

> "It is the contention of the defendant that the ordinance in question is unreasonable; that it is in violation of Section 19, of Article 1, of the Bill of Rights of Ohio, and of Section 1, Article 14, of the Amendments of the Constitution of the United States, in that it deprives defendant of the equal protection of the law, and attempts to compel it to furnish gas without an adequate return."

Again the court says, on pages 54 and 55:

> "Although the right to regulate the price of gas must be conceded to be vested in the council of the City of Newark, nevertheless it is equally well settled that a rate fixed will be enjoined as invalid under the 14th Amendment of the Constitution of the United States, unless the same is just both to the public and the owner."

A reference to the opinion of the Court of Appeals, by Shields, J., a majority of the court concurring, this reference is made to the defense urged and insisted upon in that court, and is the sole and controlling ground upon which the opinion rests. Referring to pages 81, 82 and 83 thereof, the court say:

> "It might here be remarked that courts have not been slow to safeguard property rights when the protection afforded by the 14th Amendment of the Constitution of the United States has been denied, nor, on the other hand, has the strong arm of the law been withheld from the public to protect it from imposition and wrong. With this record before us, showing the net earnings of the Company for the period named to be unusually large on what has been found to be the reasonable value of its plant, can the reasonableness of the rate fixed by said ordinance be successfully challenged as being obnoxious to or in contravention of the provisions of said 14th Amendment? The action of the city council being admittedly within the limits of legislative authority, and its action being founded upon modes of procedure adopted for the government of municipal legislative bodies, such modes are to be regarded as due process of law * * * * unless it should be made to appear that the constitutional provision safeguarding property rights has been disregarded. * * The claim sought is, that it takes private property for public use without just compensation in violation of the 14th Amendment, which forbids any state to deny any person within its jurisdiction the equal protection of the laws."

On a petition in error to the Supreme Court of the State of Ohio, the statement of facts in that court, referring to the answer, this language is used:

> "It charges further that said ordinance is contrary to and in violation of Section 1 of the 14th Amendment of the Constitution of the United States, in that it denies to said Company the equal protection of the law, by compelling it to furnish

gas for a period and at a price without adequate return, compensation or profit."

And the opinion in this case by the Supreme Court affirms the judgment of the Court of Appeals, wherein the controlling defense urged by counsel, and decided against their contention, was the defense that the ordinance was violative of Section 1, Article 14, of the Amendments of the Constitution of the United States.

This was the issue from the inception to the close of this case; and according to our practice, the decision of the Supreme Court of Ohio is a reversal or affirmance of the Court of Appeals. In this case it resulted in an affirmance of the decision of the Court of Appeals, which was by a divided court, Voorhees, J., dissenting.

The Federal Question.

The question therefore is, is a federal question presented? Is there a right or privilege under the Federal Constitution denied to this plaintiff in error? Because this court has frequently decided that it is the federal question alone that gives jurisdiction to this court, and is the only question which it will decide; that the federal question must be necessary to the case and decision; that the rights of the parties must turn upon it; that it must be the controlling question and dominant issue. It has been decided by this court, that when the federal question is fairly presented, that it cannot be evaded when necessarily involved in the case; and authorities are not wanting that if a federal question is fairly presented by the record, and its decision is necessary to its determination, although it be rejected, avoided or dodged, it is as much against the right as if it had been directly refused or ignored. It is likewise recognized by abundant authority, that the United States Supreme Court is the

sole judge of the question of its own jurisdiction, and can alone decide whether there is a federal question presented.

This whole controversy turns upon the rate fixed by the city council.

Rate making is always a legislative function, whether exercised by the legislature or by a subordinate body to which such power has been delegated, as in the present case.

The foregoing analysis of the pleadings and decisions show that in the original petition filed in the Court of Common Pleas, this defense was then made; that it was insisted upon, urged and argued through all the courts, and decided adversely to the claim of the plaintiff in error.

The ordinance of March 6th, 1911, fixing this rate, was addressed to the whole gas operation, and to cover a period of five years; namely, production, transportation and distribution. But the consideration of the evidence, its relevancy and legal effect, as distinguished from its weight or sufficiency, was, as we claim, misapplied; and as to its competency and legal effect, that question may be reviewed by the Federal Court.

The source of supply of the Newark Natural Gas and Fuel Company was the Logan Natural Gas and Fuel Company. These two companies were allied under the same management, and together performed the function of production, transportation and distribution of the product, under a contract whereby their interests were united, the Logan Company receiving 70 per cent. and the Newark Company 30 per cent of the gross receipts received from the aggregate readings of the consumers' meters. The 70 per cent, by virtue of this contract, was always the money of the Logan Natural Gas and Fuel Company, and transmitted to it by the Newark

Company, as provided in the contract. Hence, it was vital that the rate fixed and determined by the city council of the City of Newark should have relation to all the activities of both companies. On this theory the case was tried, although not in exact harmony with the pleadings.

STATEMENT OF FACTS.

The Newark Natural Gas and Fuel Company was organized in 1889, then known as the Everett Company, and for nine years was both a producing and distributing company. It became stranded, having neither cash, credit, or gas available. In 1898 it sold all of its property to the stockholders of the Logan Natural Gas and Fuel Company, which was organized in 1894. Thereafter, both of said properties were under the same control, the Newark Company confining its activities to distribution alone, and the Logan Natural Gas and Fuel Company, chiefly to production and transportation.

In 1904, the Logan Company entered into a contract with the Newark Natural Gas and Fuel Company to furnish the gas needed to supply the City of Newark for a period of ten years, on a percentage basis of the aggregate readings of the consumers' meters, in the proportion of 70% of the gross receipts for the Logan Company and 30% for the Newark Company. (See contract, defendant's brief, pages 45 to 50, inclusive).

Prior to the sale by the Newark Company in 1898, the City of Newark granted to said Newark Company, a twenty-five year franchise, and also included and fixed in said ordinance a rate of twenty-five cents per thousand cubic feet, for a period of ten years, for gas delivered to consumers. The two companies then operating together, the one producing and transporting natural gas to the city of Newark, and the other, owning the dis-

tributing system and distributing to consumers on a percentage basis; each was alike interested in the rate.

At the time that this ordinance was passed, to-wit, 1898, there was no adequate supply of gas, nor means of transportation in Ohio. Early in 1900, a new field, large in area and production, was developed, known as the Knox-Licking field near by the city of Newark. In view of this, the two companies interested in this rate voluntarily reduced the 25 cent rate to 18 cents. This field continued to be a great producer until about 1909, the usual life of a gas field, (eight to ten years), when it had depleted to such an extent in rock pressure, that the local supply was wholy inadequate, except at tremendous cost of installing large compressor stations, and even then the supply was supplemented by large quantities of gas from West Virginia territory.

The first ordinance fixing the rate expired in 1908. In the then depleted condition of the field, said companies sought a higher rate, because the experience of operating under the contract which obtained between the two companies, at the low rate of 18 cents, had proven beyond question that the increased cost of production and transportation made the price wholly inadequate to the Logan Company, even if the 30% to the distributing company, (the cost of which always remained the same), was sufficient. After three years delay by the city, on March 6th, 1911, in the light of the experience of depleted fields, increased cost of production, and the experience of an 18 cent rate for many years, the city council passed an ordinance fixing the rate at the same inadequate and unreasonable rate, to-wit: 18 cents, net.

This rate was for a period of *five* years. It was a *unit;* five years or nothing; addressed in form to the Newark Natural Gas and Fuel Company, but in fact it was intended to be and did cover a rate for the produc-

tion, transportation and distribution of gas from the field or well to the consumer. In the light of these years of experience, at the 18 cent rate, this rate could not be accepted because as the years had passed, the depleted field and all the gas wells were growing less and less in rock pressure and efficiency.

ARGUMENT.

As heretofore stated, there never was any serious contention that for the simple feature of distribution, which alone was performed by the Newark Company receiving therefor 30% of the aggregate reading at the consumers' meter, was not fairly sufficient, but that the production and transportation must likewise be included in the rate for the allied company receiving 70% of the gross receipts in order to meet the cost of production and transportation of the product.

Therefore, the argument made that opportunity was afforded for the introduction of evidence concerning the effect of the operation of the rate fixed, falls to the ground, because the experience of four or five years previous with the same identical rate was not aided or helped by being repeated in a new ordinance. This 18 cent rate needed no further illumination or the light of experience.

A large volume of evidence proved conclusively that at the time that this rate ordinance was passed, to-wit, March 6th, 1911, that the cost of the production and transportation of natural gas alone was equal to the entire amount of the rate, to-wit, 18 cents, or more, thus leaving nothing for the distribution feature at all, and was equivalent to confiscation of its property.

Rate making is a legislative function, whether exercised by the legislature or by a subordinate body to which such power is delegated, and when this ordinance

was passed in 1911, it was addressed to the Newark Gas Company as an adequate price, while in the light of the record in this case, with the experience of several years at the same rate, as the evidence shows, it is utterly inadequate and confiscatory. It is not a question of the weight of the evidence. It is a question of the relevancy and legal effect that was given to the evidence in not permitting it to be applied to the entire activity of bringing the gas from the wells to the consumer.

After two years the contract with the Logan Company would expire, and hence three years proven by past experience at an 18 cent rate, and the field and wells thus further depleted, no contract to furnish gas to the Newark Company could, by possibility, be made with any available company for less than the entire rate offered, to-wit, 18 cents.

As heretofore stated, the fixing of this rate for five years is a unit. It is for five years or nothing. It was intended that we should accept it, not for any shorter period than the full five years. With the experience of many years under this rate, with knowledge of the field, wells, and conditions surrounding, no acceptance could be made, because no other result could happen than confiscation of the property of the instrumentalities, no matter what or whom they might be, whose property was involved in furnishing gas to the consumer. It is not a question of prophecy, but a question of the actual experience of years at this same identical rate.

It is no answer to say that all must be centered around the very time that suit was brought, because the ordinance was not to stop then but run for five years in the future, and it required no prophecy or devination, because for eight or nine years the rate had been 18 cents; but conditions had changed, and were fast chang-

ing. Depleted fields, rock pressure reduced, increased cost, etc.

During the time that this suit was pending in the courts, and as a counterpart thereto, another suit was brought by the city, joining the Logan Natural Gas and Fuel Company, praying that the court decree and adjudge that the two companies were *one* and *identical;* and on hearing, the court granted the prayer and enjoined the Logan Company from refusing to supply its product, to-wit, natural gas, to the Newark Company, according to the terms of the ordinance.

In the present suit before this court, an attempt was made by the city of Newark absolutely to divorce the two companies, but the evidence in this record discloses their exact relation. In the second suit by the City of Newark, it was to amalgamate the two as one entity, and this is now the decree of the court.

Why should there not be a rate just to both or all instrumentalities furnishing natural gas from the wells to the consumer? This is just to the public and to all concerned. The rate when fixed must cover a fair and reasonable return to all the instrumentalities, persons or companies, devoting their property to the business and activity of furnishing natural gas to the consumer, and the evidence in this case was addressed to that fact. What is a reasonable and proper rate for natural gas delivered to the consumers for a period of five future years?

This case should proceed upon this theory. The record not only discloses the cost of gas to the distributing company, but also the cost to the Logan Natural Gas and Fuel Company, and all of this latter evidence covering the questions of production and transportation at the time that this suit was brought, showed that the

cost of gas was equal to or greater than the entire rate fixed, to-wit, 18 cents.

Nothing is better settled in the law than that each case must rest upon its own peculiar facts.

Counsel for the City rely in support of the motion filed herein, upon the doctrine announced by this court in the cases of *Wilcox vs. The Consolidated Gas Company,* 212 U. S. 17. Also, *Knoxville vs. Knoxville Water Company,* 212 U. S. 1. But it will be observed that those cases differ essentially and radically from this case. In the Wilcox case, the defendant gas company was both a producer and distributor of gas. It was artificial gas manufactured by it and distributed, one company or activity only being employed. In the Knoxville Water Company case, the Water Company owned the supply as well as controlled distribution. But in this case the Newark Natural Gas Company does not produce and has no means of producing natural gas; it must purchase its gas either in the open market or under contract with some producing company. That fact was at all times well known to the city council when it passed the ordinance of March 6th, 1911. The ordinance, therefore, should have been based upon the cost of producing gas, or upon the market price of gas, as well as the cost of distribution, because the Gas Company should have been placed in a position under the rate to do business and to be able to purchase the article it marketed; otherwise, it would have to close its doors and go out of business.

But the city council ignored wholly the factor of cost of production, and so did the courts reviewing the case. The earning of the Newark Company obtained by distributing gas, was the sole fact considered. This court, we believe, in the case of *Covington and Lexington Turn Pike Road Company vs. Sanford,* 164 U. S.

578, 597 and 598, has furnished the proper rule for the guidance of rate making bodies. In the above case Justice Harlan, speaking for the court, says:

> "In short, each case must depend upon its special facts, and when a court without assuming itself to prescribe rates is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway as an entirety so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, *together with all other circumstances that are to be considered,* by determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority and practically deprived the owner of property without due process of law.
>
> "The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature when exerting its general powers, is that it receive what, under all the circumstances, is just compensation for the use of its property as will be just both to it and to the public."

Upon the element of the cost of producing gas, the Gas Company offered the following testimony: See Exhibit "P" prepared by Mr. Drolett and his evidence showing the cost of producing gas per thousand cubic feet by the Logan Natural Gas and Fuel Company.

EXHIBIT P.

COMPARATIVE STATEMENT SHOWING COST OF PRODUCING GAS—PER 1000 CUBIC FEET BY THE LOGAN NATURAL GAS AND FUEL COMPANY— FOR YEARS 1903 TO 1911 INCLUSIVE

	1903	1904	1905	1906	1907	1908	1909	1910	1911
FIELD COST									
Repair of Lines, Wells, Labor Drilling New Wells, etc	.0184	.0182	.0253	.0209	.0249	.0180	.0292	.0368	.0340
Field Operating Expense, Lines, Wells, etc.	.0101	.0166	.0296	.0376	.0329	.0378	.0412	.0518	.0649
Gen'l Field Exp., Taxes, etc.	.0072	.0054	.0056	.0051	.0089	.0066	.0054	.0060	.0072
TOTAL FIELD COST	.0357	.0402	.0605	.0636	.0667	.0624	.0758	.0946	.1061
FIXED CHARGES									
Depreciation on Field Only	.0183	.0209	.0272	.0307	.0267	.0309	.0338	.0387	.0403
COST OF GAS IN FIELD	.0540	.0611	.0877	.0943	.0934	.0933	.1096	.1333	.1464
PROFIT									
3% Upon Field Investment	.0244	.0279	.0363	.0409	.0356	.0412	.0451	.0516	.0537
TOTAL COST OF GAS IN FIELD	.0784	.0890	.1240	.1352	.1290	.1345	.1547	.1849	.2001

THIS PA
VERTIC

E BOUND
L IN BOOK

EXHIBIT 9.

COMPARATIVE STATEMENT SHOWING THE AVERAGE PRICE PER 1000 CU. FEET OF GAS, RECEIVED BY THE LOGAN NATURAL GAS AND FUEL COMPANY, FROM OTHER COMPANIES. FOR YEARS 1903 TO 1911 INCLUSIVE.

CONTRIBUTORS	1903	1904	1905	1906	1907	1908	1909	1910	1911
Bellevue Gas Company	.1652	.1677	.1617	.1622	.1725	.1845	.1914	.1984	.1932
Dayton Gas Company	....	....	....	.1756	.1855	.1892	.1915	.1907	.1873
Delaware Gas Company	.1577	.1561	.1585	.1580	.1667	.1808	.1816	.1824	.1782
Marion Gas Company	.1351	.1375	.1331	.1320	.1514	.1651	.1839	.1805	.1741
Citizens Co. (Elyria & Lorain)	....	.1254	.1309	.1328	.1435	.1564	.1811	.1925	.1673
Sandusky Gas & Electric Company	....	.1471	.1435	.1383	.1506	.1651	.1663	.1728	.1646
Fremont Gas, Elec. Light & Pwr., Co.	....	.1191	.1173	.1182	.1279	.1370	.1670	.1667	.1603
Buckeye Gas Co. (Circleville)	....	.1216	.1296	.1374	.1475	.1444	.1468	.1508	.1548
NEWARK NATURAL GAS & FUEL COMPANY	.0634	.0962	.0968	.0967	.1006	.1040	.1050	.1116	.1176
Average received from all Gas Sold by The Logan Company	.1208	.1284	.1326	.1438	.1554	.1661	.1753	.1820	.1749

Cost of Gas to the Logan Company.

A. J. Drolett, the Auditor of the Union Natural Gas Co., which is the controlling stockholder in both the Logan and the Newark Company, in detail showed the business done by the Logan Company as well as the Newark Company; he says, the Logan Company has approximately 466,000 acres under lease in Ohio, the average rental is $1.00 per acre. In the Knox-Licking field it has 43,000 acres, in the Sugar Grove 24,000, in the Ashland field 399,000.

The field cost for natural gas which included repair of lines, repair of wells, drilling new wells, changing construction, repair of meters in 1903 was 3.57c, in 1911, 10.61c.

Depreciation based on 6% on field investment ranged from 2.11c per M. in 1903 to 4.03c in 1911.

Profit based on 8% for field investment increased the price of gas in 1903, 2.81c, in 1911, 5.37c.

Gas in the main line without transportation charges including an 8% profit and six per cent depreciation in 1904 cost 8.91c, in 1911, 20.01.

The Logan Company under its contract with the city of Newark received for gas furnished to this city in 1904, 9.62c, in 1911, 11.76c.

The Logan Company in all the towns to which it furnished gas received on an average in 1903, 12.08c, in 1911, 17.49c.

The total production of gas by this company in 1903 was 9,016,000,000 cubic feet, in 1911, 8,259,000,000 cubic feet.

Of this total amount of gas produced the city of Newark received in 1903, 21%, aud in 1911, 18.2%.

This was the only testimony offered upon the cost of producing gas in the case.

The City of Newark must bear its just proportion and *pro rata* share, not only of the cost of distribution, but of the production and transportation and all that that implies, in addition.

Market Price or Cost of Gas at City Limits.

We further urge that under the ruling of this court the market price of gas in communities similarly situated and conditioned as the City of Newark, is to have influence. Upon this matter we refer to the following authorities:

> "Current rates for other transportation within the same territory by the company in question, or by other companies for performing similar services, is evidence which will furnish a test for the value of the particular services in question.
>
> "This was one of the strongest arguments in the Naval Stores case to show that the Savannah rates were themselves unreasonable. This comparison cannot be made as the cases hold without considering dissimilar conditions; and conditions may be so dissimilar that no comparison would be proper. Thus in a recent Illinois case, involving the reasonableness of switching rates, the court in holding that it *was error* to deny the company the right to prove the usual and customary charges during the time in question for services in other cities and places in the state said, that while charges which are usual and customary are not necessarily fair and reasonable, and a charge which is fair and reasonable, in one place, is not necessarily fair and reasonable in another; yet proof of what is usual and customary under sustantially like conditions in many places in the state tends more or less to prove what is fair and reasonable in any particular place in the state."
>
> Interstate Commerce Commission vs. Louisville & N. Ry. Co., 118 Fed. Rep. 613, (1902).

Southern Pacific Co. vs. Interstate Commerce Commission, 177 Fed. Rep., 963 (1910).

Chicago P. & St. L. R. R. Co. vs. Peoples, 136 Ill. App. 2 (1909).

Wyman, section 1216. Rates reasonable *per se.*

"In arriving at the real value of anything its *current price is good evidence.*"

Upon the theory that evidence of that character was proper the Gas Company offered the testimony of every gas company doing business in central Ohio, and the City did not attempt to rebut this testimony.

John M. Girard, vice-president and general manager of the Ohio Fuel Supply Company, gives the cost of gas at the city limits, 20 cents; price or cost delivered to the consumer, 30 cents.

D. A. Upham, president of the Upham Gas Company, gives the cost of gas to the consumer, 30 cents; and depreciation in rock pressure, from 750 pounds to 50 pounds.

M. E. Lytle, superintendent of the Ohio Fuel Supply Company, gives rock pressure 810 pounds down to 125 pounds.

Judge J. B. Waight, gives cost to the consumer, 25 cents; depreciation in rock pressure, from 800 pounds to 150 pounds.

Judge F. O. Levering gives the cost to the consumer, 27½ to 30 cents; depreciation in rock pressure, 800 pounds down to 100 or 200 pounds.

D. W. Wallace, superintendent of the Buckeye Gas Company, gives cost to the consumer, 25 cents, net; depreciation in rock pressure, 700 pounds to 140 pounds.

S. S. Wyer gives the cost to the consumer, 30 cents, net.

The Gas Company also offered evidence, that before this ordinance was passed the city council directed its clerk to ascertain the price paid for gas in other cities throughout Ohio, with the result that the clerk made the following report to the city council:

This is the report of the clerk as found in Journal 15, page 496, council meeting, December 19, 1910: (He reads): (From Journal No. 15, Council Proceedings, Newark, Ohio, pages 496 and 497):

"NEWARK, OHIO, DECEMBER 19, 1910.

"TO THE HONORABLE COUNCIL,
CITY OF NEWARK, OHIO.

GENTLEMEN:

"Upon the request of Mr. Oliver D. Irwin, I have written to several of the surrounding towns and cities in regard to the natural gas situation and the following is a brief outline of the information received:

"Coshocton is paying for one thousand cubic feet of natural gas twenty-eight cents, with a discount allowed of ten per cent; they state they do not know how long the present franchise lasts and that the supply of gas in their vicinity is not decreasing and that the price of natural gas should remain the same.

"Shelby, Ohio, is paying at the rate of thirty-three cents and one-third for one thousand cubic feet of natural gas with a discount allowed of ten per cent, and that their franchise will last until the next three years and that they will not grant a new franchise under the existing rates, also that the supply of gas in this vicinity is decreasing.

"Marion, Ohio, is paying at the rate of thirty-three cents for one thousand cubic feet of natural gas with a discount allowed of ten per cent; that their franchise expires in 1912, and that the gas in their vicinity is decreasing some but not to any great extent.

"Bremen, Ohio, is paying at the rate of thirty cents per one thousand cubic feet of gas, also that they think the price of gas will be increased.

"Marietta, Ohio, is paying at the rate of twenty cents per one thousand cubic feet for natural gas with a discount allowed of two cents and their franchise lasts for twelve years, and that the wells are playing out to some extent and that the gas companies are compelled to seek new wells.

"Ironton, Ohio, is paying at the rate of twenty-seven and one-half cents per one thousand cubic feet of natural gas with a discount allowed of two and one-half cents and the franchise does not expire until twelve years from this date.

"Utica, Ohio, is paying at the rate of fifteen cents per one thousand feet of natural gas, also that the wells in the vicinity of Utica are decreasing in pressure on account of the pumping stations located near this village.

"Mansfield, Ohio, is paying at the rate of twenty-seven and one-half cents per one thousand cubic feet of gas, with a discount allowed of two and one-half cents, their franchise expires October, 1911, also stating that the price should not be increased as the supply is now nearer the city than when first piped there.

"Columbus, Ohio, is paying for one thousand cubic feet of natural gas, thirty-five cents with a discount allowed of five cents, and that the present franchise expires July, 1911, and that the Council has not considered the new rate yet.

"Junction City, Ohio, is now paying for one thousand cubic feet of natural gas twenty-five cents with a discount allowed of twenty per cent and their franchise expires in ten years and that the supply of gas in their vicinity is increasing.

"Mt. Vernon, Ohio, is now paying twenty cents per one thousand cubic feet of natural gas with a discount allowed of two cents, and that no increase has been talked of other than the increase provided in the rate ordinance. The rate franchise provides for a rate of twenty cents (eighteen cents net) up to October, 1911, and twenty-two cents (twenty cents net) from October 1, 1911, to October, 1913, another rate ordinance in favor of the Mt. Vernon Gas Light Company which has a complete outfit of mains, but which has not been

furnishing gas for six years, was passed by this Council some few days ago. The provisions of this ordinance are as the one in favor of the Ohio Fuel Supply Company except that the twenty-two cents terminates one year later on October 1, 1914.

"Cambridge, Ohio, is now paying thirty cents per thousand cubic feet for gas with a discount allowed of five cents, and their franchises expires October, 1918, and the supply of natural gas is decreasing in their vicinity.

"Delaware, Ohio, is now paying at the rate of thirty cents per thousand cubic feet of natural gas with a discount allowed of ten per cent and their gas is being delivered to them from West Virginia and that no increase is talked of.

"I have compiled the various prices paid by the cities and towns named in this communication and find that the general average of the price of natural gas per one thousand cubic feet paid by these thirteen cities with a discount off is twenty-four and one-thirteenth cents per one thousand cubic feet, and figuring the price without deducting the discount amounts to twenty-seven and three-thirteenths per one thousand cubic feet."

Respectfully submitted,

"JAMES MCCARTHY,
"Clerk of Council."

No evidence was introduced by the City of Newark, defendant in error to the contrary. It was proven, and in fact conceded, that the amount received by the Logan Company under and by virtue of its existing contract, was 11¾c, instead of 18 or 20 cents which it should have received for production, transportation and delivery to the Newark Company. The Newark or distributing company was in no wise affected by depleted fields or increased cost of production, and if the entire case must be decided upon its ability to distribute, it would be enabled to do so at a profit which might at least es-

cape confiscation when performing the sole function of distribution within the city.

The fundamental error, as we conceive it, of the courts in deciding this case was, that it became obsessed with the notion that actual experience under the rate fixed by the ordinance did not exist, and that we must abide "certainty rather than prophecy," when it can be obtained. The inspiration for this expression is the doctrine announced in cases such as *Wilcox vs. Consolidated Gas Co.* and *Knoxville vs. Knoxville Water Co.*, 212 U. S., pages, respectively, 17 and 1; and also in *Des Moines Gas Company vs. City of Des Moines*, 238 U. S., 150, wherein it is said in the Wilcox case:

> "The dismissal of a bill which seeks to enjoin the enforcement of legislative regulation of gas rates as confiscatory in absence of any actual experience of the practical results of such rates, should be without prejudice when such practical experience may prevent the complainant from obtaining a fair return upon the property used by it in its business."

And also in the Knoxville case, in which the court says:

> "Where the case rests, as it does here, not upon operation of the ordinance, but upon speculations as to its effect based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned, would lack something of the return which would save the effect of the ordinance from confiscation."

And again in the Des Moines case, wherein it is stated that the ordinance will not be disturbed on appeal,

> "especially where the ordinance was attacked before an opportunity was afforded to test its results by actual experience."

Applying this doctrine to the case at bar, the Supreme Court of Ohio rests the matter there, and concludes as follows:

> "That said company will therefore be required to abide the test of actual experience under the rate fixed by this ordinance, and when certainty rather than prophecy may be obtained it will have the right to present its case upon actual facts and conditions as they may then be shown to exist."

This, we claim to be a fundamental error, because, as we have undertaken to point out, the rule perfectly proper and just as announced in the three cases referred to, can have no possible application in the case at bar: First, because two companies were joined in the activity or business of furnishing natural gas to the consumers, and both must be considered; second, because the Newark Company had no control over its product, but was a distributor only, and was the only company considered by the court; third, because an experience of six or eight years at the identical same rate, to-wit, 18 cents, had precluded any question of uncertainty or prophecy. Every opportunity had been afforded to test results by actual experience. Fourth, because the period of this same rate that had prevailed for years in the past, was projected as a unit into the future for five years, and this in the face of depleted natural gas fields, both in rock pressure, in well efficiency, and largely decreased production, with rapidly continuing increased cost, all of which appears practically undisputed in the record.

We conclude by citing the case of *New Memphis Gas Light Company vs. The City of Memphis*, 72 Fed. Rep., 952, wherein the court says:

> "The state is under an obligation to act justly and without arbitrary discrimination between corporations of the state, just as it is between citizens of the state, enjoying equal rights. The

state cannot, under the guise of regulation, bring about a destruction and a confiscation of a company's property, and the states' power to absolutely abolish the corporation must be distinguished from its power to destroy its business and confiscate its property so long as it chooses to permit its existence and to authorize its business by a valid charter (citing numerous authorities), and the question of the reasonableness of a rate of charge is eminently a question for judicial investigation requiring due process of law for its determination. And to deprive a company of the power of charging reasonable rates for the manufacture and sale of gas is to deprive it of the use of its property, and, in effect, of the property itself, without due process of law."

Respectfully submitted,

EUGENE MACKEY,
S. M. DOUGLASS,
JAMES R. FITZGIBBON,
CHARLES MONTGOMERY,
Attorneys for Plaintiff in Error.